IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 223

JESSE JAMES GILBERT,

Petitioner,

vs.

STATE OF CALIFORNIA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

PETITIONER'S REPLY BRIEF

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ARGUMENT

I. Petitioner Was Deprived of the Due Process of Law Under the Fifth and Fourteenth Amendments of the United States Constitution When the Trial Court Permitted the Jury to Hear the Out-of-Court Declarations of Co-Defendant King Which Extensively Recited Petitioner's Participation in Murder, Robbery and Kidnaping.

This Court has granted certiorari to either reconsider the 5 to 4 *Delli Paoli* decision 352 U.S. 232 (1957)) or to consider its import and limitations. cf. *United States* v. *Bozza*, 365 F. 2d 206, 216-7 (2nd Cir. 1966); *Greenwell* v. *United States*, 336 F. 2d 962 (D.C. Cir. 1964).

In our opening brief we pointed out that under the circumstances of this case it was far more difficult for the jury to segregate the co-defendant King's extra-judicial statement and limit it to him than it was for the jury to pass on the issue of voluntariness in *Jackson* v. *Denno,* 378 U.S. 368 (1964) as separate and distinct from and preliminary to a determination of guilt or innocence. Respondent resignedly concedes the erosion of *Delli Paoli* although he maintains that in this case the Court carefully instructed the jury to not consider King's out-of-court statements against Gilbert and concludes that the jury must have followed the law given them by his Honor.

As a matter of fact, respondent in seeking to minimize King's out-of-court declarations merely accentuates the devastating impact they must have had. Not only did King mention Gilbert's name some 159 times (Pet. Op. Br. p. 8) and describe in detail the robbery and killing using Gilbert's name (ibid) but his hearsay statement also recited to the jury that after the killing Gilbert bragged of killing a policeman and promised to kill more. (R.T. 1953-56; Resp. Br. 37) He then attempted to kill King, the co-defendant, and was unsuccessful. (Resp. Br. 37-38) Certainly this made Gilbert out as a most dangerous societal menace.

The respondent argues that even though this devastating evidence was introduced via King's extra-judicial declarations alone (he did not so testify) (Resp. Br. p. 38) that this testimony was not repeated on the death penalty phase of the case. While this is true, it is crucial to point out that the same jury which determined the death penalty deliberated on the question of guilt or innocence and consequently was most mindful of Gilbert's alleged dangerous propensities. (Calif. Sup. Ct. Op. 47 Cal. Rptr. at 922)

As a matter of fact, if we were to consider only the rest of the evidence and the part of King's statement regarding Gilbert's participation in the bank robbery it is quite conceivable that the jurors, who are given a wide latitude in the determination of penalty in California, see Cal. Pen. Code 1190, would have felt that no matter how much of a confirmed robber Gilbert might be the killing arose out of a unique situation wherein he was trapped and felt that either he or the police officer had to go. In the other robberies neither police officers nor victims were brutalized. But with Gilbert's life hanging in the balance the jury had indelibly imprinted in its mind King's statements concerning Gilbert's accomplishment in killing a police officer and promising to kill more. The import of these statements is undeniable.

The lower Federal courts have often reversed cases wherein the co-defendant's extra-judicial declarations have been admitted into evidence and reasonably viewed must have damaged the defendant. See *Schaffer* v. *United States,* 221 F. 2d 17 (5th Cir. 1955); *Barton* v. *United States,* 263 F. 2d 894 (5th Cir. 1959); *United States* v. *Bozza,* 365 F. 2d 206 (2nd Cir. 1966). *Greenwell* v. *United States,* 336 F. 2d 962 (D.C. Cir. 1964) (Deletion of defendant's name not enough to cure the defect). In fact, the amendment to Rule 14 of the Federal Rules of Criminal Procedure which was adopted in July, 1966 was premised upon the impossibility of two being jointly and fairly tried where one of the parties gives out-of-court hearsay statements which seriously incriminate the other. See Annot. to 18 U.S.C. Rule 14.

The respondent argues that the evidence against Gilbert was overwhelming notwithstanding the declarations of King. However, in view of the elaborate statements re-

ferred to in both the opening brief and here and the "cop-killer" description of Gilbert it is indeed an understatement to say that the hearsay account of King "might have contributed to the conviction." *Fahy* v. *Connecticut,* 375 U.S. 85 (1963). As the Court stated in *Barton* v. *United States, supra,* " 'Mitchell was bound hand and foot by the most awesome array of evidence imaginable, quite apart from the confession of Barton.' We cannot, however, substitute ourselves for the jury, whose duty it was to pass upon Mitchell's guilt or innocence. As was said in Kotteakos v. United States, 1946, 328 U.S. 750, 765, . . .

' . . . . The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand.' " 263 F. 2d at 898.

In *United States* v. *Haupt,* 136 F. 2d 661, 672 (7th Cir. 1943) the Court declared:

"We doubt if it was within the realm of possibility for this jury to limit its consideration of the damaging effect of such statements merely to the defendant against whom they were admitted." See *Greenwell* v. *United States, supra,* for application of *Fahy* test.

Although the Attorney General hypothesizes that the jury might have discredited King's testimony on the thesis that it was in his interest to blame Gilbert (Resp. Br. p. 38), this is whimsical. First, the notion is pure surmise. Secondly, it is most unlikely that the jury would feel that King's statement, which so perfectly squared with the independently recovered facts, would be pure fabrication. Rather, the jury would have the human tendency to assume

that on matters where independent evidence was missing King was likewise telling the truth.

As suggested in our opening brief, this case is clearly contained within the rationale of *Jackson* v. *Denno, supra.* Only here the situation is worse. There the jury was required to make an initial determination as to whether a confession was voluntary before laboring on the question of guilt or innocence. However, once the determination of voluntariness was made the confession would either be considered or rejected. We agere that it is unlikely that a jury, even a conscientious one could comply with that requirement. But here it is perfectly obvious that the jury is required to wear two hats and perform a function which would tax even an able trial judge. The jury was asked to accept the declarations of King as true, that is, what he, Gilbert and Weaver did, and then consider them untrue as far as Gilbert was concerned. (See Pet. Op. Br. pp. 12-13) This indeed called for a "feat beyond the compass of ordinary minds," or "a mental gymnastic which is beyond not only their powers but anybody else's." *Nash* v. *United States,* 54 F. 2d 1066, 1067 (2nd Cir. 1932); see *United States* v. *Bozza, supra,* at p. 215.

The respondent further maintains that a motion for severance should be held a condition precedent to the raising of a due process violation on the ground that a co-defendant's confession was illegally introduced. (Resp. Br. p. 45) First and foremost, the California Supreme Court did not regard this factor of moment, especially in view of the fact that its own case which excluded the evidence, *People* v. *Aranda,* 63 Cal. 2d 518, 407 P2d 265 (1965) was decided subsequent to the Gilbert trial and counsel

could not reasonably anticipate the change in the law. Secondly, it would have made no difference since the trial court considered his instructions to the jury adequate to protect the defendant. Thirdly, the statements by King were inadmissible anyhow and it should not have been anticipated that they would be admitted in evidence. See California Supreme Court Op. 47 Cal Rptr at 915-16. Finally, only the prosecution knew what it would introduce in evidence. Therefore, if the prosecuting attorney intended to introduce the damaging statements of King and he knew they would infect Gilbert's chances of a fair trial this information should have been disclosed in a pretrial setting; otherwise, counsel for Gilbert's protests when the statements were offered is objection enough. (R.T. 1939)

In view of the obvious realization that no amount of instruction could have secured Gilbert a fair trial on either the guilt or penalty phases after King's hearsay utterances had been heard by the jury charged with determining Gilbert's fate this case should be reversed and a new trial had on competent evidence unsinged by the damaging hearsay declarations of the co-defendant King.

II. Petitioner After Being Indicted by a California Grand Jury for Murder, Robbery and Kidnaping Was Appointed a Lawyer by the Court and Entered Pleas of Not Guilty to All Charges. Thereafter, He Was Compelled to Then Participate in a "Showup" at Which the Prosecution Cemented Its Case Against Him. The "Showup" Was Conducted Without Prior Notice to Either Petitioner or His Attorney of Record and His Attorney Was Not Afforded an Opportunity to Be Present Nor Make Objections to the Proceeding. This Activity Was in Clear Contravention of the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

One of the issues in this case—Right to Counsel at a lineup—is also presented in two companion cases granted Certiorari this term. They are *United States of America* v. *Wade,* No. 334 and *Stovall* v. *Denno,* No. 254. As pointed out in our opening brief, *Wade* held that the Sixth Amendment guaranteed the accused the right to have counsel present at a lineup after the inauguration of judicial proceedings. *Stovall* adhered to a contrary view. In both cases dissents were registered. Also of importance is the fact that the Ninth Circuit Court of Appeals in *Gilbert* v. *United States of America,* 366 F. 2d 923 (1966) held by a two to one margin that Gilbert (your petitioner in the case at bar in a similar case at the Federal level) had not properly presented his "Lineup" issue in the trial court and thus was foreclosed from raising it on appeal. The majority then proceeded to, in the form of elaborate dictum, discuss the issue, as if it had been properly raised and rejected it. The dissenting judge considered the issue not only prop-

erly before the Court but held that Gilbert's Sixth Amendment rights were violated. Judge Browning, in dissent, would have remanded the cause for a determination of the extent to which the eyewitness in-court testimony was contaminated or bolstered by the illegally conducted lineup at which eleven of the twelve percipient witnesses were in attendance.

Inasmuch as the lineup issue in *Gilbert, Stovall* and *Wade* presents substantially the same questions and this counsel has the Government's brief in not only *Gilbert* but in *Wade*, an attempt will be made to survey the entire question of right to counsel at a lineup and urge this Court to set forth what we feel is appropriate Constitutional doctrine.

The opposition's argument when reduced to its essence is predicated upon the insistence that a lineup, no matter whether it occurs after the initiation of judicial proceedings or before is investigatory rather than accusatory in nature, and that the plenitude of Right to Counsel cases requiring an attorney's presence at every stage of criminal proceedings are limited to traditional pre-trial, trial and post-trial events presided over by a judge. Among the most common of these are preliminary hearings, arraignments, pre-trial motions, and the trial itself; and of course, in the event of poor luck probation and sentence, and appeal. Then assuming that its position is well taken, the Government (Federal and State) seeks to convince the Court that the Sixth Amendment Right to Counsel in non-judicial situations is merely an adjunct to the Fifth Amendment Privilege against self-incrimination and serves no other purpose. Finally, the opposition argues that a "lineup" or "showup" involves no question of self-incrimi-

nation and consequently the defendant may be compelled to perform and has no right to either an attorney's advice or presence. Moreover, there is the additional inquiry which must be made under *Palmer* v. *Peyton*, 359 F. 2d 199 (C.A. 4 1966), namely whether the lineup was conducted under such circumstances as to render it violative of Due Process of Law. All four of these contentions are an integral part of the Government's case. Rejection of any substantiates Petitioner's position.

In the event petitioner succeeds in convincing the Court that Gilbert's rights at the lineup were violated, this conclusion carries in its wake the issue of what effect to give the violation. Should there be an *ipso facto* reversal without a showing of possible prejudice under the standard Right to Counsel cases, *Hamilton* v. *Alabama*, 368 U.S. 52 (1961) or should this Court merely exclude the Constitutionally prohibited evidence and apply the test formulated in *Fahy* v. *Connecticut* which requires that there be a showing that the evidence complained of "might have contributed to the conviction," 375 U.S. 85 at 86 (1963). If this latter course is followed shouldn't the tainted fruit of the lineup illegality be likewise excluded? If so upon remand what test should be applied to determine if the in-court testimony was tainted?

Quite candidly the evaluation of these issues calls for the most far-reaching, probing analysis into controversial and complicated Constitutional questions which have meandered into one case that this counsel has ever witnessed. Petitioner will endeavor to fully and fairly tackle each question which presents itself, structure the hierarchy of considerations involved, evaluate the precedents and their bases and portray the counter-horrendum to the Govern-

ment's critique of our position. We answer the provocative questions seriatim.

Our fundamental position is that the Right to Counsel attaches *at least* by the time that judicial proceedings commence. *Hamilton* v. *Alabama,* 368 U.S. 52 (1961); *White* v. *Maryland,* 373 U.S. 59 (1963). When a defendant appears in Court for arraignment, whether it be after indictment or a complaint by a judicial officer, suspicions have not only focused upon him as a triable suspect on a specified charge for which he has been arrested but the prosecution is then thoroughly bent on cementing those charges and the defendant on refuting them or disposing of them in some alternative manner. Since it is necessary that the court and the police throughout the land know when they must afford counsel to the accused in order to operate swiftly and effectively and protect fundamental rights, it is imperative that the onset of the Right to Counsel be as definite as judicial wisdom will allow. The initiation of judicial proceedings provides the best stage upon which to introduce counsel considering all factors involved. Certainly the right should germinate no later although perhaps this right should accrue at the time of arrest. See Argument III. After all a man should not be arrested unless there is probable cause to believe he has committed a specified crime. This notion is implicit in the *Mallory* rule (*Mallory* v. *United States,* 354 U.S. 449 (1957)); otherwise the police would be permitted extensive post-arrest investigation of the subject prior to bringing him before a magistrate and having him informed of his rights.

The value of having the Right to Counsel attach at a traditional stage of Anglo-American criminal proceedings is that these stages repeat themselves in all criminal law

suits and allow for ease of demarcation. To anchor the Right to an Attorney to a concept where there is such great disagreement and difficulties of interpretation and application as self-incrimination commits this court to an unnecessary *ad hoc* analysis of the circumstances of the situation in order to determine whether the Right to Counsel should have attached. Such factors as the nature of the test or examination, how scientific it is at a given moment in our history, how great a role the defendant plays in the acquisition or release of evidence, how voluntary his participation is, whether his mind is exploited to garner the evidence, factors of promises, threats and coercion have all dented the pages of our legal textbooks and decisions. (See Argument III.) While over-simplification is not a virtue, simplicity where possible is not a vice. Moreover—and this is the most telling point in opposition to the Government's overall contention—since both the courts and police must know with reasonable certainty when a subject has the right to an attorney since the penalty for a mistake is at least an exclusion of the evidence, a formulation by this Court in terms of the stages of criminal proceedings is essential. There are at present and on the horizon many practices which may or may not invoke the Fifth Amendment against self-incrimination and unlike the Right to Counsel which is a relatively definite concept there are nuances within each potential self-incriminatory situation which will prevent its elevation to the degree of exactitude possible in Right to Counsel situation. Since this is the predicament and there is a need for a prospective understanding as to when the Right to Counsel attaches it would be folly to make that right hinge upon conditions which will at the least require retrospective examination.

Predicated upon the assumption that nothing which occurs at a lineup threatens the Fifth Amendment, the Government argues that counsel could have performed no function but intermeddle or serve as an additional witness so why confer upon the defendant the Constitutional right to the presence of an intermeddler or mere additional witness at a proceeding?

Of course, based upon what we have said hitherto, the Right to Counsel, not only his presence at the lineup but his advice before attending, should not depend upon a demonstration that he could have advised his client along certain lines or aided the Administration of Justice. As counsel for *Stovall* so well puts it in his opening brief in answer to the question of "what could counsel have done to thwart the identification?", "it is not an attorney's duty to thwart anything, be it an identification, a confession or conviction. It is an attorney's duty to try and protect his client's rights and insure against over reaching by the prosecution." (Stovall Op. Br. p. 13) Counsel might have convinced the trial judge that if a lineup was to be held the witnesses should have been sequestered and asked to identify the robber individually rather than being placed in an auditorium where they announced their identification in the presence of the other witnesses as in this case. Although the majority in the *Gilbert* federal case attempts to proffer a defense of consensus identification procedures, 366 F. 2d at 943, it is nearly universally accepted that solitary identification, at least in the beginning is a safer procedure for correctly identifying the guilty. Ibid 953-55 (dissent)

Consensus identification has all the disadvantages of leading questions, doubt elimination and the join the band-

wagon appeal rolled into one. When one witness identified Gilbert it was only human that special attention would be called to him as distinct from others in the lineup. It's the same thing as an in-court identification if the prosecutor were to say, "that's the man isn't it?" Beside the leading question aspect, there is the human tendency to become more certain when other persons have identified a suspect because the identifying witness need not shoulder the burden of conscience himself but shares that responsibility with others. Even worse than this objection is the bandwagon appeal. The human propensity to join the majority is awesome in such a setting. This is the argument against broadcasting election results before the closing of the polls. People like to be winners and don't like to waste their effort being losers. Plus there is the psychological realization that approval follows adherence to the thoughts of one's compatriots while the dissenter is generally treated as an outcast. Furthermore, one eyewitness doesn't like to be thought of as less observant than his neighbor which will be his appraisal of other's estimation of him should he not so quickly recognize the "guilty party" or have some lingering doubts.

In California, and I'm sure elsewhere, it is so traditional as to be ritual to exclude witnesses during a trial and have the judge instruct them not to discuss their testimony with one another. California Penal Code Sec. 867, 868. This is done as a matter of rote even at the preliminary hearing held before Superior Court arraignment because of the court's astute recognition that once the lonely task of identification is eliminated and the consensus approach is embraced, opinions once confirmed are practically impossible to dislodge. Ibid.

This was precisely the problem in *Palmer* v. *Peyton, supra,* where the court held that the identification procedures violated due process because the witness who admittedly could only identify the guilty party by voice was first shown a shirt which she identified as worn by the rapist and then told to listen to his voice. Needless to say she had little trouble in reaching the conclusion that she had the right man. Albeit the situation is not as clearcut here, but one can surmise the avalanche of witnesses until the number reached eleven who identified Gilbert after the first few had shouted out their identifications. Mr. Justice Frankfurter once wrote that "(T)here comes a point where this court should not be ignorant as judges of what we know as men." *Watts* v. *Indiana,* 338 U.S. 49, 52; Cf. *Sheppard* v. *Maxwell,* 86 S. Ct. 1567 (1966)

Can there be doubt in this case that the deluge of eyewitnesses was the undeniable product of the first few?

In addition to the failure to sequester witnesses, which is the most dramatic objection to the lineup in this case, the court formally or perhaps the Defense Attorney via an informal suggestion to the police or prosecutor might have assured that participants in the lineup were "not grossly dissimilar from the accused in physical appearance." *Gilbert* v. *United States,* 366 F. 2d 923 at 953 (1966)

It may have been the case that a magistrate or even the prosecutor would have allowed the defense counsel to question alleged eyewitnesses in order to decide whether to proceed further with his case. See *Gilbert* v. *United States, supra,* 953. In reality, it is not obstructionist tactics by counsel that the prosecution fears but the first hand knowledge of the strengths and weaknesses of a lineup which

can be only comparatively weakly explored at trial. Although statistics don't exist and are probably impossible to obtain, one can safely surmise that a fairer more objective identification is assured by counsel's presence. Just as custody interrogations of the accused can be unfair so can police-conducted lineups. Trickery and coercion may be employed in any accusatory predicament. This Court in *Miranda* v. *Arizona*, 384 U.S. 436, 470 (1966) recognizes the role counsel can play in cutting down on coercion or unfair tactics. Indeed in the jurisdictions which provide for attorney's presence at a lineup, there has been no suggestion that defense counsel has impeded the administration through unwarranted interference with the identification of offenders. *Gilbert* v. *United States, supra*, 953-55 (dissent).

The Government's brief in the *Wade* case is replete with references to how absurd it is to allow counsel to be present when a lineup is held but not be present when photographs are shown to witnesses. (Wade Br. p. 18-19) Moreover, it is urged that it is even more ridiculous to hold that counsel is required to be present when fingerprints or hair samples are taken and not be present when they are analyzed. (ibid) However, the defect which permeates this comparison is that it assumes that the right to counsel is congruent with the privilege against self incrimination and that since a lineup, in the mind of the Government, is not basically different from photographs and fingerprints, it follows that we would have defense counsel present when mug shots or fingerprints are taken and that since the analysis and followup is at least as important as the acquisition of this evidence counsel must trail the chemist into the laboratory and the detective as he conducts subsequent

interviews. Petitioner strongly suggests that the parade of horribles painted with the imagination of the Government is the strongest argument for not tieing the Right to Counsel into the Fifth Amendment privilege against self-incrimination.

Furthermore, there is a fundamental difference between purely investigatory activities and post-arraignment proceedings. Certainly a premium must be placed on the early solution of crime and apprehension of criminals. Thus surveying the scene for witnesses or showing of photographs to prospective witnesses or the lifting and development of fingerprints and the like should be permitted without counsel but not because a defense attorney's presence would block the administration of justice or prevent the discovery of fresh clues leading to capture and arrest. Rather, police activity should be allowed because general investigation into an unsolved crime does not require the services of a defense attorney. Neither is he or should he be involved in developing a case for the prosecution which would warrant the arrest, indictment and arraignment of a prospective defendant on a specified charge.

But once the arraignment stage is reached, his advice and his presence can most surely prevent overreaching. See *Gilbert, supra,* 953-54, fn. 9. Furthermore, the Government's attempt to equate post-arraignment and pre-arraignment events which share the likeness of involving the same investigative technique amounts to "a matching of cases on irrelevant facts." See *Silverman* v. *United States*, 365 U.S. 505, 512-513 (1961) The suggestion that photographs may be examined by witnesses before arrest and indictment without counsel so why not after arraignment or fingerprints may be taken before arrest and indict-

ment so why not after, is misleading. As well argue that these events cannot take place *in trial* unless counsel is present, so why should they be allowed to take place before trial without his presence. The crux of the matter is that the question should not be whether the matter tends to incriminate or what type of investigative technique is involved but *at what point this court should attach the Sixth Amendment!* Again we stress that having an attorney or even a judge present during the preparatory phases of the prosecution's case is not a positive evil. It is just not practical enough to constitute a Constitutional command nor is it a proper function for a defense attorney.

Similarly, we may dispose of the Government's contention that a post-arraignment identification procedure, whether using photographs or a lineup is substantially no different than one preceding indictment since the Government is still preparing its case. (See Wade Br. p. 12)

Although the Government stresses that counsel would be merely another witness for the defense and that the defendant can testify to what occurred, this is not quite the case. It has been recognized, as previously stated, that counsel gives the proceeding an assurance of fairness; furthermore, a defendant in a criminal case is not considered an unbiased witness. Examine the number of convictions obtained in cases where there are but two witnesses, a police officer and a defendant, in vice or narcotic transactions, for example. We cannot posit as a general proposition that the prosecutor through the lethal mechanism of cross examination although it may be "the greatest legal engine for the discovery of the truth" relentlessly attacks the defendant and exposes him as an arrant liar in these cases. Normally no such expose is forthcoming in one-on-one

situations involving a police officer and a defendant and the prosecutors' and defense counsels' who can avow to such a contention are legion. Although the jury is traditionally instructed that the word of a police officer is entitled to no greater weight than that of a defendant by virtue of his being a police officer, it certainly is accorded more weight in the traditional case. As long as both the defendant and police officer tell reasonable stories the police officer will be believed if for no other reason than the common sense appraisal that officers who have not had previous contact with subjects don't arrest them without cause. In fact, this Court has even recognized that once a defendant or even prosecution witness has been dirtied with the accusation of criminal activity he no longer stands on a par with other witnesses. See *On Lee* v. *United States*, 343 U.S. 747, 756 (1952) Thus again, we demonstrate that the presence of counsel during any of these procedures is not a positive harm but may be a positive good.

Similarly, when the Government starts from the premise that counsel is more needed when fingerprints are compared and analyzed or blood tested than when fingerprints are taken and blood extracted there is still the hidden premise that counsel may have functions to perform albeit his defendant is absent and not presently in use and the Fifth Amendment may not be involved. This is a premise we wholeheartedly endorse. Were we to shape the right to counsel anew we would strenuously argue that he should attend police procedures, not directed at determining whether a crime had been committed or who did it, but those conducted subsequent to the arrest of a suspect because his presence would assure fair procedures and he would be a witness where now there is none. Again we take

refuge in the fact that it is not necessary that the Court go that far but that if the Court were disposed to do so it would be a positive good for the legal system as a whole. And we hasten to reiterate that the Government has in reality destroyed the myth that counsel need only be concerned about keeping his client's lips sealed until the proper time to speak, if at all. He has services to perform involving evidence received from or dependent on his client and those services may well need to be performed when the client is absent.

If the Government contends that counsel had no right to attend this lineup because the defendant had no Constitutional right to prevent an immediate confrontation of the defendant and victim immediately upon discovery of the crime and apprehension of the defendant or no right to be present when photographs were shown to witnesses when a search for the guilty party was in progress we merely reply that if at trial the prosecution were to spot blood on the defendant's boots that defense counsel would have the right to be present while the material was analyzed and I doubt if there's a judge in the land who would deny him that right. Similarly, although counsel has no right to be present at the scene of the crime when the defendant is arrested, he might well have if any function were to be performed there during the trial. If the scene of the crime is to be viewed during the trial, counsel is one of the first to be invited to attend.

Another flaw in the position of the Government is that there is such an entity as a "lineup" or "showup." Basically what is involved is a situation wherein a potential witness views the defendant or hears him speak. This process can occur under a variety of circumstances. But to refer to

a lineup as an entity is like classifying all writing of a defendant as a handwriting exemplar. It's the kind of handwriting specimen, the content and the context which determine Fifth Amendment Rights. See Argument III. Similarly, the context of the lineup determines the rights conceivably violated. The embroidery is all important. We know some lineups can be held so rank an injustice as to offend due process, putting aside other constitutional considerations. See *Palmer* v. *Peyton, supra.* We know that exemplars may constitute confessions, or admissions or even exculpatory statements which are afforded Fifth Amendment protection. See *Miranda* v. *Arizona, supra.* And note that exculpatory statements are cast as admissions and are protected under *Miranda, supra,* for the reason that in a trial context they may inculpate. Any competent trial lawyer knows that a frightened defendant may convict himself without cause by denying his presence at a commotion and be proved a liar when his presence was properly explainable in terms of non-criminal conduct.

Petitioners flatly state that no case has ever held that a lineup cannot place the defendant in a setting where he is called upon to incriminate himself. In the most quoted case on the subject of whether a defendant can prevent exhibiting himself by the assertion of the Fitfh Amendment there is usually a neglect to cite the part of Justice Holmes dictum wherein he expressly reserved the question of "how far a court would go in compelling a man to exhibit himself" because of the Fifth Amendment. *Holt* v. *United States,* 218 U.S. 245, 253 (1910)

Much as a lie-detector may make one a self-accuser, see *Schmerber, infra,* p. 1832, so may a lineup. An incriminatory item or the name of the deceased, presumably unknown

to a lie-detector subject, if innocent, which causes an appreciable rise in pulse rate and blood pressure while innocuous items and names do not, may furnish useful evidence obtained because of the subject's terror-reaction engendered by his own guilt. Likewise, as here, Gilbert was described as not raising his voice when first asked to do so, *Gilbert* v. *United States,* at 951 (dissent). The lineup thus wrung out of him the same type of incrimination as a lie detector working at its optimum. Although there is very little in the State trial record of the Gilbert case on the actual performance of Gilbert and the other participants in the lineup, the Attorney General candidly brings to the Court's attention the extensive involvement of the participants which appears in the Federal trial record. See Resp. Br. p. 65-6, n. 2. Not only were Gilbert and his cohorts in the experiments required to present their front and profile views to the witnesses congregated in the auditorium but were required to put on and remove certain items of clothing, presumably the same or similar clothing worn by the robber sought to be identified. They were asked to speak in a loud and then a soft voice and to utter phrases such as "Freeze, this is a stickup"; "This is a holdup"; "This is a heist"; "Don't move anyone"; "Empty your cash drawer", etc. See *Gilbert* v. *United States, supra,* p. 951, ibid. These were the phrases reportedly uttered by the gunman-killer. In effect, Gilbert was compelled to reenact the crimes. Gilbert was also required to walk at both a normal and rapid pace. He was also asked about ownership of an automobile and whether he was armed when arrested. Ibid. Since the car Gilbert was known or was thought to have travelled to the bank and departed in was well known, this called for an incriminatory response. Furthermore, the question of whether he was armed when

arrested sought an incriminatory answer. If Gilbert told the truth, (The California Supreme Court held the trial court committed error in introducing proof that Gilbert was armed when arrested in Philadelphia), he made himself suspect for carrying a gun and appeared dangerous as well. If he answered no, he would reasonably expect to be impeached at trial so he might have concluded that he may as well admit carrying the gun. There is no evidence that anyone told him that his statements at the lineup were of a particular breed and would not be used against him at trial. On the contrary, he had been informed prior to that time that his statements would be used against him. See facts of Philadelphia arrest. Thus he was forced either to utter incriminatory admissions or to make a scene and assert his right to silence which would tab him as the guilty party right away.

Counsel may have been able to avoid all of this. Assuming for the purpose of argument that the statements placed in his mouth were not incriminating and were only to be uttered for the purpose of voice identification his counsel could have advised him that he could speak what he was told to speak, as all other persons were instructed to do likewise, but that he could refrain from ad-libbing answers to questions concerning the crime or the circumstances of his arrest. If counsel were advised of the lineup and allowed to be present and told what questions were to be asked and the responses to be elicited, he could have eliminated all of the clearly incriminatory material. If not, a ruling from a judge on a motion could have been secured.

The Government will certainly concede that a defendant has a right to have an attorney present motions for him in court and to have a judge rule on them. Yet here, appro-

priate motions were not made because counsel was not contacted and thus had no opportunity to make them. If the right to counsel is disallowed or held in abeyance, or proceedings are held in secret without counsel being advised, the Government can hardly argue that the motions could be made at trial if the damage had been earlier rendering the motions futile or tardy. See *Hamilton* v. *Alabama, supra.*

The thrust of the above illustrations of what can happen and has happened at a lineup point unerringly to the conclusion that counsel should be advised that it will take place so that he may advise his client, discuss the matter with the prosecutor, police and court and be present to assure fundamental fairness. If this is done, incriminating statements, such as those obtained here, which were used to garner or bolster witnesses can be avoided, tricks and coercion can be deterred, see *Gilbert* v. *California, supra,* 954, fn. 9, and decisions such as *Palmer* v. *Peyton, supra,* won't have to be reversed.

Nothing that has been suggested in defense of extending the Right of Counsel to a post arraignment lineup is predicated upon suggestions which have been greatly criticized by judges and our opponents in these cases such as advising a defendant that he need not participate in the lineup at all or not wear certain clothing or wear a mask to shield his appearance. See *Stovall* v. *Denno,* 355 F. 2d 731, 739 (2nd Cir. 1966); *Gilbert* v. *United States, supra,* 941. Lamentably, most of the diatribe against our position has concerned itself with controverting a straw man assertion that our position—that Right to Counsel at a lineup—hinges upon counsel being able to prevent its occurence at all, having the right to mask the defendant and telling

him to remain totally silent. As the court can see, our position is not bottomed upon any of these considerations.

However, this Court has not previously decided the extent to which a defendant need participate in a lineup, if at all. It has not decided that a defendant must participate in trying on clothing worn by the robber and utter phrases uttered by him at the time of the crime.

Let us first consider the question of clothing to be worn at the lineup. Normally a mug shot shows only the countenance, profile and build of the subject and doesn't serve to place incriminatory clothing upon the defendant. If the picture shown the witness happened to disclose the same sweater, for example, which was later worn in a robbery there could be no objection because the prosecution or police could not be charged with anticipating that the person once mugged would subsequently commit robberies wearing the same apparel which he wore at the time his mug shot was taken. Even if they could, the defendant would have no Constitutional right to wear one garment rather than another.

However, when a defendant is asked to actively take clothing provided him, and put it on so as to resemble the man who committed a crime this requires a voluntary act on his part which most certainly incriminates him. Whether this is protected by the Fifth Amendment this Court must decide. Unlike the handwriting exemplar which is tantamount to an assertion, "This is my handwriting", *Weintraub, supra,* p. 5031, the defendant would not be saying: "This is my jacket" or "This is my hat" in a lineup because all other persons would be doing the same thing and consequently the placing of clothing upon each subject denudes

the personal warranty. However, if the assailant in *Stovall,* for example, were taken to the hospital room wearing clothing which he was required to outfit and it was virtually identical with that worn by the criminal, the clothing would assert to the prospective witness that it belonged to the defendant and he was the guilty party. Similarly, in *Wade,* if the defendant is seen wearing clothes similar to those worn by the robber in the hallway in the custody of the police and prior to a lineup wherein each person puts on the same apparel the defendant would be incriminating himself in the Constitutional sense. Thus once again we see the question of self-incrimination cannot be resolved by setting out categories such as handwriting, fingerprinting, photographing, lineups, lie detectors and ruling as an immutable principle of Constitutional law that certain classes are self-incriminatory and others are not. If this cannot be done then how can this Court tie the important Right to Counsel principle which must be evaluated prospectively, to a right that is far more complicated and often requires an *ad hoc* retrospective evaluation to determine if it existed and was violated.

Decisions in lawsuits are usually dedicated to resolving featured problems. For example, the pivotal issue in *Schmerber* v. *California,* 86 S. Ct. 1826 (1966) was the limitations of the Fifth Amendment. This Court recognized that too broad a construal of the Fifth Amendment would never allow for compliance with the Fourth. If all items which the defendant possessed either bodily, or otherwise kept under his dominion and control, were held to be protected from seizure and use because of the Fifth Amendment then no search warrant, no amount of probable cause, would ever allow for its acquisition and use in evidence.

All searches and seizures would be illegal, excepting perhaps those limited to contraband itself. *Schmerber,* this counsel believes, adopts the approach that many items which would be legitimately subject to seizure if probable cause exists do tend to incriminate and are taken from the person; nevertheless the Fifth Amendment should not be interpreted to encompass them. In other words, the query is *Schmerber* is whether the kind of self-incriminating evidence involved should be given Fifth Amendment protection.

This Court's opinion in the *Schmerber* case (86 S. Ct. 1826-1966) was very guarded on the Sixth Amendment issue. There it was merely held that the results of the blood test did not become inadmissible merely because the defendant's attorney had instructed him not to take it. Since the defendant had no Constitutional right to refuse the test, the fact that his attorney had previously falsely advised him as to his right in that regard did not operate to exclude the evidence. The Court then concluded the Right to Counsel question by declaring: "No issue of counsel's ability to assist petitioner in respect to any rights he did possess is presented. The limited claim thus made must be rejected." At page 1833.

Thus the Court simply declined to hold that the well-established rule that a defendant has the absolute right to an attorney after the commencement of judicial proceedings should be extended to a pre-judicial event wherein the police were merely gathering evidence for the purpose of presenting it to the prosecutor in order to ascertain whether a complaint should be lodged.

It is not our position that the defendant has a Constitutional right to have counsel at the scene of the crime at the

time of the occurrence of his arrest; it is not our position that the evidentiary investigation which precedes the arrest and the inception of judicial proceedings must be presided over by a judge or conducted in the presence of the defendant or his attorney. But it is our position that after the proceedings become judicial in nature the defendant should have an attorney to advise him and should have to do nothing without first being able to consult with an attorney.

As a matter of fact, the notion that an attorney would be a hindrance to the administration of justice since he might try and disrupt efficient police work is probably not correct. And if it is correct, it is only because there is simply not enough manpower to provide judges at the scene of a fingerprint or ballistics examination who could listen to the suggestion of both Government and defense attorneys on the question of procedures designed to secure fair tests; perhaps even neutral experts unconnected with the police force should make examinations. It has long been a complaint of the criminal bar that while police serve as investigators for the prosecution there is no one—except in the case of the affluent—to serve as investigator for the accused. It is even possible that the police could be ordered by the court to carry out investigations for the accused. The fact that they are primarily prosecution-oriented because they are engaged in the principal task of ferreting out crime and apprehending criminals does not incapacitate them from serving the role of investigator for the accused. Much as the Government is supposed to prosecute only the guilty and protect the accused, in theory, such should be the function of the police force. Perhaps in the year 2000 such an approach will become integrated into our way of life. It certainly has much to speak for it. The police and

prosecution would become more neutral and less zealous in the pursuit of prosecutorial inclinations.

But since this is the world of 1967, Petitioner is content with suggesting that there is ample precedent and common sense favoring the selection of an attorney to journey with a defendant from the inception of judicial proceedings to their conclusion. See Argument II of Petitioner's Opening Brief. Therefore, the argument of the State of California that if the lineup was vulnerable under *Massiah*, it was vulnerable under *Escobedo* does not necessarily follow. (Resp. Br. p. 61) Nor has this Court so stated. (*Massiah* and *Escobedo* majorities not identical) Furthermore, the fact that a majority of this Court declined to extend the Right to Counsel to the evidence-gathering phase of the *Schmerber* case, when not even a District or City Attorney had been consulted about a complaint for drunk driving, and the police had not yet learned whether the defendant was intoxicated, and if so to what degree, should not prevent this tribunal from securing the right to counsel after the police had arrested the defendant, the District Attorney obtained an indictment, the defendant was arraigned and the Judiciary of the State of California had properly appointed the defendant an attorney to represent him throughout the proceedings.

The final questions have to do with the effect of the error committed. Traditional right to counsel cases have reversed automatically when this precious right was denied. *Johnson* v. *Zerbst*, 304 U.S. 458; *Hamilton* v. *Alabama*, *supra*. Recent cases have focused on the harm done and made that the basis for decision. For example, *Massiah* v. *United States*, *supra*, and *Escobedo* v. *Illinois*, *supra*, reversed because certain incriminatory statements were ex-

tracted after the right to counsel attached and because of inadequate advice as to the defendant's Constitutional rights. Presumably, the statements alone were rendered inadmissible.

Petitioner suggests that at least what is required in this case is that the illegality be totally purged, that is the lineup and its impact on the trial be isolated and if this material "might have contributed to the conviction," *Fahy* v. *Connecticut, supra,* at 86, the cause should be reversed. We strongly urge that this Court follow the reasoning in the dissent in *Gilbert* v. *United States, supra,* wherein an accommodation principle is suggested. Obviously such violations as occurred here must be deterred and yet the Court may not wish to void all trials in which error is committed. This case should ordinarily be remanded for a determination of the role the lineup identification played in bolstering or assuring the in-court testimony. However, we strongly urge here that the consensus lineup rendered any future fair individual account of what the alleged eyewitnesses saw a virtual impossibility and suggest that the cause be reversed and the case dismissed. Petitioner will still be facing a 100 year Federal sentence so the only practical effect would be the erasure of the death penalty accorded him by the trial jury in the State case.

III. Petitioner After Being Apprehended in Pennsylvania by Federal Agents Asserted His Right to an Attorney and His Right to Silence. Nevertheless, Through Unwarranted Questioning at the Least and Probable Trickery, Gilbert Was Compelled to Furnish the Agent With Handwriting Exemplars Which Were Used to Prove Guilt of the Charges Against Him. Thus, His Sixth, Fifth and Fourteenth Amendment Rights Were Violated.

We feel that it has been amply demonstrated in our opening brief that Petitioner-Gilbert never waived his right to an attorney nor his privilege against self-incrimination (Pet. Op. Br. pp. 25-28), thus we pass immediately to the response of the Attorney General of the State of California dedicated to showing that the handwriting exemplars extracted from Gilbert did not constitute Fifth, Sixth and Fourteenth Amendment infringements.

A. *Petitioner's Sixth Amendment rights were violated.*

Respondent asserts that the Right to Counsel attaches only in situations wherein the accused is called upon to incriminate himself. (Resp. Br. p. 72) This fundamental right is not nearly so limited. *Miranda* v. *Arizona*, 384 U.S. 436, 465 n. 35 (1966); *Hamilton* v. *Alabama*, 368 U.S. 52, 53-54 (1961); see *Gilbert* v. *United States*, 366 F. 2d 923, 955 (9th Cir. 1966) (Browning, J., dissenting), and *Stovall* v. *Denno*, 355 F. 2d at 743 (Friendly, J., dissenting). Although a defendant has a Constitutional right not to incriminate himself, this is but one of the fundamental guarantees which attach at the time of his custodial predicament. Escobedo was informed of his right to remain silent

and that anything he said could be used against him but this Court nevertheless reversed because the defendant's Right to Counsel had been denied. *Escobedo* v. *Illinois*, 378 U.S. at 499 (White, J., dissenting). It is now settled that this right attaches without request. *Miranda* v. *Arizona, supra.* Similarly, as in *Escobedo*, here, after his arrest and before trial was the time when Gilbert needed counsel most. *Powell* v. *Alabama*, 287 U.S. 45, 57 (1932). Otherwise, the remainder of the proceedings become merely an appeal from a police trial rather than the fair judicial trial to which the accused is entitled. Inasmuch as the Sixth Amendment Right to Counsel had attached prior to the securing of handwriting exemplars from the defendant they should have been excluded and the cause reversed. See *Hamilton* v. *Alabama, supra; Massiah* v. *United States*, 377 U.S. 204 (1964); *Escobedo* v. *Illinois, supra.*

B. *The handwriting exemplars taken from petitioner were in violation of his Fifth and Fourteenth Amendment Rights.*

The respondent contends that the petitioner had no right to refuse furnishing to the F.B.I. samples of his handwriting because handwriting is not within the scope of Fifth Amendment protection. (Resp. Br. pp. 72-79) We vigorously disagree! It is argued that handwriting exemplars are not "testimonial or communicative" in nature, see *Schmerber* v. *California*, 86 S.Ct. 1826 (1966). However, unlike the blood donor in *Schmerber*, the person providing an exemplar must do a voluntary mental act which creates the evidence against him. While Schmerber was merely required not to resist the routine taking of blood, Gilbert was required to affirmatively bring into existence the hand-

writing exemplars. In fact, fingerprints, photographs and blood could all be acquired from a passive defendant but handwriting requires the active participation of the subject. Moreover, the authorities have shown that the exemplar is tantamount to a declaration that "This is my handwriting" which is most definitely "testimonial" or "communicative" in character. Weintraub, 10 U and L. Rev. 485, 503 (1957); see Maguire, Evidence of Guilt 31 (1959); *Gilbert* v. *United States,* 366 F. 2d 923, 952 (1966) (Browning, J., dissenting).

Respondent suggests that Gilbert was only asked to provide an example of his writing and not to copy a sketch of the bank area drawing found earlier in his apartment. (Resp. Br. p. 78) Clearly there can be no Constitutional difference between the two performances! In each the defendant is forced to furnish an example of his handwriting and in each there then follows either expert or lay opinion that the exemplar (whether a signature or a map drawing) is made by the same person as the one who sketched the map found in the apartment. The mere fact that the one may call for a more sophisticated analysis than the other is not a fulcrum for determining the existence of a constitutional right. A defendant cannot be compelled to give even clues to his downfall much less render it a near certainty. See *Ashcraft* v. *Tennessee,* 322 U.S. 143 (1944). Here the unauthorized matchup of Gilbert's handwriting sample with the bank-map found in his apartment spelled his doom as clearly as if he'd said "the handwriting is mine" without being first informed that he could say nothing.

Next the State of California asks this Court to hold that as a matter of Constitutional law handwriting is real

or physical evidence like eyewitness identification, photographs or fingerprints. This, in spite of the fact that there is substantial evidence supportive of a conclusion that questions of analysis and interpretations are far more difficult in the handwriting realm. See Weintraub, *supra,* p. 497 fn. 43.

Implicit in this suggestion are a number of troublesome problems: First, there is the underlying premise that the more definite a science becomes—the more precise, accurate and pinpointing its measurements—the less Fifth Amendment protection is involved; or to be more exact, when a so-called police science which requires interpretations of factual phenomena reaches the stage where a consensus regards it as scientific and unlikely to produce error, the raw material of that science which hitherto had received Fifth Amendment protection is then elevated to the "real evidence" shelf and the problem of self-incrimination is put aside. Here the Attorney General would have the court draw from the group of authorities holding handwriting on a par with photographs and fingerprints and place the Constitutional imprimatur of "real evidence" upon handwriting samples. Contrary authority is to be ignored. That procedure commits this Court to the *ad hoc* process of evaluating police tools designed to extract evidence from the accused in order to rule Fifth Amendment coverage either in or out. Furthermore, until this Court decides a given problem, the question of whether the defendant has the right to refuse surrendering or, as here, manufacturing evidence and has the right to have counsel present hang in the balance and are subject to the vagaries of the police and lower courts.

This foreseeable problem provides convincing ammunition for not anchoring Sixth Amendment Right to Counsel

protection to Fifth Amendment evidence problems. Right to Counsel as explained earlier should be tied to perennial and inescapable stages of all criminal proceedings, either at arrest or at the initiation of judicial proceedings. If the Right to Counsel, at least in a pre-trial setting, hinges solely on whether material encompassed by the Fifth Amendment is subject to seizure, counsel plays the highly unsatisfactory role of the bobbing cork appearing and vanishing at unpredictable intervals with neither he nor the judiciary nor the police knowing whether he should be on the scene or off nor the consequences of his absence if his presence be demanded.

Although in *Schmerber,* the Court opined that the lie detector would "evoke the spirit and history of the Fifth Amendment" (86 S.Ct. at 1832) there is every reason to believe that if its questionable scientific stature were to improve it might make the grade and become regarded as "real evidence." If the lie detector did attain that status, the prosecution would maintain that the Fifth Amendment wasn't involved because the instrument could be a boon to the defendant if he was telling the truth because it would halt prosecution. This is the same argument used to justify lineups and other prosecutorial procedures. See *Stovall* v. *Denno,* 355 F. 2d 731, 735 (1966). Of course, the answer to that claim is simple enough. The argument does not truly lead to a removal of Fifth Amendment protection but rather merely affords the defendant an opportunity to waive that protection and convince the prosecution, if it is willing, that an innocent man should not be placed on trial.

Naturally, it will be urged that the lie detector is different from a fingerprint, photograph or handwriting exem-

plar in that it seeks to invade the mental processes to obtain evidence of guilt by measuring physiological changes in the accused rather than just registering physical facts themselves. However, in principle, the lie detector may be as non-accusatorial in form as the taking of a sample of handwriting, with each carrying a potentiality towards more elaborate self-incrimination. Questions about the crime which only the guilty party would know may be directed at the accused and a rise in pulse or blood pressure recorded. Similarly, the accused may be asked to copy a ransom note used in a robbery and the exemplar can then be compared and contrasted with the note used in the holdup. Mistakes in spelling and other tell-tale errors or identities could then convict the accused.

Does the phrase "handwriting exemplar" include the whole spectrum of evidence that can be obtained by handwriting? Clearly not, for certainly written confessions must be both voluntary and preceded by appropriate Constitutional admonitions. See *Escobedo* v. *Illinois, supra.* Does the Attorney General then argue for a rule which, in effect, admits evidence of less value and requiring slightly more interpretation and excludes evidence which is more convincing and necessitates less interpretation. And do we again make the right to counsel depend upon the correct answer to all of these inquiries? Could the personal papers of *Boyd* (*Boyd* v. *United States,* 116 U.S. 616 (1886)) be seized if there was a handwriting issue in that case? If so could their purpose be limited to handwriting and if so would the courts be duty bound to carefully guard against a poisoned fruit search for evidence arising out of information contained in documents constitutionally protected against inspection or use but not

against handwriting analysis? If handwriting may be used to show identity, then may not the police seize every piece of writing found in every contraband case where dominion and control over a domicile or vehicle is involved so as to compare the document with a subsequently obtained exemplar to show possession of the premises?

As a matter of fact, if a defendant may be compelled to provide an example of his handwriting for the purpose of determining whether he wrote a demand note or a map of a bank he is alleged to have robbed, why can't the same purpose allow for the compulsory copying of either? And if that compulsory act is lawful to allow for a comparison of handwriting, may not the officer use any incriminating evidence which he accidentally learns pursuant to the purpose of comparing handwriting which is in "plain view" cf. *People* v. *Roberts,* 47 Cal. 2d 374, 303 P. 2d 721 (1956) and cannot be ignored such as spelling mistakes or a tendency to start at a certain place on the page and end at another? Does the Right to Counsel then depend upon whether self-incriminatory material was in fact obtained —a retrospective assessment—or whether it was a foreseeable event?

In summary, petitioner chiefly urges again the brace of reasons offered in our opening brief for regarding Gilbert's handwriting specimens as self-incriminatory. However, we are most mindful that this is a policy court and that such considerations as ease of administration, and ease of following of precedent, disadvantages of inviting a plethora of *ad hoc* determinations unless necessary are significant factors in attacking a problem. Furthermore, inasmuch as very few cases can receive the attention of this Court it is often necessary to comment upon the im-

portant issues raised by a case such as this one—problems which will inevitably arise and in great quantity as an outgrowth of the pronouncement of this decision. This reply brief has been primarily aimed at probing some of these questions.

Finally, it is our position that under either a Right to Counsel analysis where no inquiry into prejudice occurs, see *Hamilton* v. *Alabama, supra,* or under the *Fahy* test (*Fahy* v. *Connecticut,* 375 U.S. 85 (1963)) where the error need only have been one which "might have contributed to the conviction," this cause must be reversed. Certainly no little weight can be given to the fact that proof was offered that Gilbert was seen to write an exemplar which proved that he also drew the map of the bank which was robbed and where the policeman was murdered.

IV. The Case Against Petitioner Was Derived Largely From Evidence Illegally Obtained From a Private Dwelling Without a Search Warrant, an Incident Arrest or Consent in Violation of Amendments Four, Five and Fourteen of the United States Constitution.

A review of both opening briefs convinces us that the basic issues involved in the larger Search and Seizure question are before this Court with proper briefing. It is only necessary to refer to several citations mentioned for the first time in Respondent's brief. The Attorney General cites the case of *Caldwell* v. *United States,* 328 F. 2d 385 (8th Cir. 1964) cert. den. 380 U.S. 984 (1965) for the proposition that the F.B.I. agents had the right to open the envelope found in Gilbert's apartment containing the photographs for identification purposes. Caldwell only

stands for the proposition that property abandoned—in that case a car and its contents—no longer has search and seizure protection. The *Caldwell* court relies upon authorities where evidence was held legally obtained because it had been wilfully produced or left abandoned. In this case there was no authority given to break in Gilbert's apartment and roam around picking up everything in sight.

Respondent also quarrels with the lengths to which petitioner puts the "tainted fruit" doctrine. We cited the standard cases holding that *all* fruits of the illegal search and seizure or illegal detention should be forbidden usage by the Government. Additional cases so indicating are *Nueslein* v. *District of Columbia,* 115 F. 2d 690 (1940); *Rogers* v. *United States,* 330 F. 2d 535 (5th Cir. 1964); *United States* v. *Marrese,* 336 F. 2d 501 (2nd Cir. 1964); *Bynum* v. *United States,* 262 F. 2d 465 (1958). Respondent cites the case of *Smith* v. *United States,* 324 F. 2d 879 (D.C. Cir. 1963) cert. den. 377 U.S. 954 (1964) wherein the Court of Appeals, with Judge Bazelon dissenting, refused to exclude the testimony of a witness against the defendant when it was shown that the defendant was not promptly arraigned under the *Mallory* decision and during this period of time furnished to the police the name of an eyewitness to the crime. They later located him and he testified against the defendants at trial. The Court held the taint too attenuated to require exclusion of the testimony. Judge Bazelon in his dissent emphasized that the policy of deterrence requires that the taint be traced as far as it can and rooted out wherever possible. Otherwise, violations of the law will still be encouraged. If officers know full well that they may not seek to admit evidence illegally seized but

can nevertheless use it to bolster witnesses, obtain other evidence and follow up leads, or even use the evidence in a subsequent civil proceeding, see *One 1958 Plymouth Sedan* v. *Commonwealth of Pennsylvania,* 85 S.Ct. 1246 (1965); *Boyd* v. *United States,* 116 U.S. 616 (1866), the search and seizure prohibitions will serve as little of a deterrent since it has been generally acknowledged that civil suits for false arrest and the like are frivolous and rarely successful. See *Mapp* v. *Ohio,* 367 U.S. 643 (1961).

In this very case photographs of Gilbert were used to obtain the testimony of eyewitnesses to the bank robberies and a drawing of the bank area in Gilbert's handwriting was taken from his apartment and used to compare with an exemplar later obtained from Gilbert after his arrest in Philadelphia. Thus the fruits of the illegal seizure proved most helpful to the prosecution. To discourage their use, all taint flowing from their usage, extrajudicial, as well as in-court, should be located and denied admission in evidence. The case should be remanded and that evidence substantially dependent upon the illegally seized materials should be excluded from the next trial. Evidence free of taint should be held admissible. This allows for the best possible overall accommodation between the interests of the people and the accused. See *Gilbert* v. *United States,* 366 F. 2d 923, 956-58 (1966) (Browning, J., dissenting).

Respectfully submitted,

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